1764. *July* 6. ANDERSON and CRAIG *contra* MAGISTRATES of Renfrew.

No 75.
A prisoner being suffered to escape, by the fault of the jailor, is the benefit of discussion competent to the Magistrates?

WILLIAM STEVENSON, baker in Paisley, being indebted to James Anderson in L. 25 Sterling, by accepted bill, and to John Craig in L. 7 : 16 : 0 Sterling by open account, and being *in meditatione fugæ*, was incarcerated upon a warrant from the Justices of Peace, till he should make payment of the debts above mentioned, or give security. Having escaped by the fault of the jailor, a process was brought against the jailor for payment, and against the Magistrates for damages, as being answerable for their jailor. A decree in absence went against Stevenson. But for the Magistrates it was contended, That an action of this kind against the Magistrates of a burgh, is only subsidiary after discussing the principal debtor; and therefore, that they the defenders cannot be liable till Stevenson be discussed. *Answered*, 1*mo*, That Stevenson is sufficiently discussed by the decree in absence against him, especially as the report goes that he has fled the country, and in fact has not been seen since he broke prison; 2*do*, The Magistrates are directly liable, without necessity of discussing the principal debtor. To the *first* it was replied, That there is here no sufficient discussion. The decree in absence against Stevenson has not been extracted, nor any diligence taken out against him to be evidence of his insolvency. Whether he have left the country or no the defenders are ignorant; and it is sufficient for them to say, that there is no evidence of the fact.

The Court however found the defenders conjunctly and severally liable, which could not well be upon the footing that Stevenson was sufficiently discussed so as to presume him insolvent; but, upon the other footing, that there is no necessity in this case for discussion. And how far this opinion is founded in law I proceed to examine.

The present question will but rarely occur. The common case is an escape where the imprisonment has proceeded upon horning and caption, which, of itself, is sufficient discussion, leaving no opportunity for the Magistrates to plead in defence, that the debtor is not sufficiently discussed. The only case then where the present question can arise, is, where the debtor is imprisoned for some delict, as in the present case, and for failure of payment.

The *medium concludendi* against Magistates, when a prisoner is suffered to escape, is neglect of duty in them or in their jailor; for whom they are answerable, which at common law subjects them to damages. Being thus liable for their own fault, the nature of the action does not of itself afford them the privilege of discussion. But may not this privilege be competent to them upon a different ground, namely, that the extent of the damage cannot with certainty be known, till the debtor be discussed and found to be insolvent? It appears to me, that upon the ground now mentioned, the privilege of discussion is competent at common law.

No 75. But there seems to be a ground in equity for a variation, which is, that the Magistrates be made liable *prima instantia*, leaving them upon an assignment from the creditor to discuss the debtor; for it appears more equitable to lay the burden of discussion upon the Magistrates, *in pœnam* of their negligence, than upon the innocent creditor.

Upon this equitable ground, the Magistrates of a burgh having disobeyed a charge to apprehend a debtor under caption, were found liable directly to pay the debt, even after the debtor's death, without necessity of transferring against his representatives the decree upon which the caption proceeded, 26th March 1634, Dunbar *contra* Provost of Elgin, No. 30, p. 11701.

But this rule of equity supposes that the debt is liquidated by a bond or by a decree; for there is no equity to oblige Magistrates to pay any sum in name of reparation, while it remains uncertain whether it may not exceed the debt truly due. And, accordingly, in the case Clerk *contra* Magistrates of Leith, 21st January 1704, No 60, p. 11731, where the claim was illiquid, it was justly found that process could not be sustained against the Magistrates till the extent of the claim should first be ascertained in a process against the debtor.

In the present case the claim is ascertained by decree against the debtor, and one of the articles is ascertained by a bill. And the extent of the debt being thus aseertained, equity, as above, requires that the Magistrates should be directly found liable, reserving to them to discuss the debtor, if they hope to make the debt effectual against him. Upon this ground the foregoing judgment appears to stand, and in that view it appears to be right.

Sel. Dec. No. 219, *p.* 283.

1780. *December* 7.

ANDREW GRAY *against* The MAGISTRATES of Dumfries.

No 76.

IN an action against the Magistrates of Dumfries, for not receiviug and incarcerating a prisoner for debt, duly presented to one of their number by a messenger, it was

Pleaded in defence, 1*mo*, The Town of Dumfries being the head borough of a border county, where debtors attempting to escape from the one country to the other are daily apprehended, it had been their immemorial custom to require the creditor-incarcerator to fix a domicil within the borough, at which intimation might be made, in terms of the statute 1696, c. 32. "Anent the aliment of Poor Prisoners." And this demand not having been complied with in the present case, the Magistrate, who refused to receive the prisoner, was justified by the practice of the borough, however erroneous it might be; *See* CONSUETUDE, SECT. 3.

2*do*, The prisoner was a notour bankrupt: he had no heritable estate: his moveable subjects were under sequestration, and payment could not have been